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Parklane Plowden Family Team Under 10's Newsletter

Iain Hutchinson

Case Note: Re A-F - Guidance on the useage of the CoP of Family Division Jurisdiction for 16/17 year old.

In **Re A-F (Children) (No 2) [2018] EWHC 219 (Fam) (Sir James Munby P)** The President, as he then was, gave guidance on the appropriate jurisdiction for the difficult cases of 16/17 year olds who are subject to a deprivation of liberty. The case concerned seven children who were to be made subject to final care orders, however two of the children either had or will have their 18th birthday under the final order. The making of final orders was, at this stage, seemingly uncontentious and recommended by the Local Authority and Children's Guardian. The Court had confirmed it would grant the orders sought, the remaining point of consideration was the implications for those children who were to attain majority.

At Paragraph 6 Munby P states:

In relation to the third matter, the starting point is that the Court of Protection has jurisdiction in relation to children who have attained the age of sixteen years and who lack capacity within the meaning of the Mental Capacity Act 2005. So too, in relation to such children, the Family Court has jurisdiction in the context of care proceedings under Part IVof the Children Act 1989 and the Family Division of the High Court, subject to the requirements of section 100 of the 1989 Act, can exercise its inherent parens patriae jurisdiction. The question, therefore, has been raised as to whether these two cases should remain in the Family Court (in relation to the care proceedings) and the Family Division (in relation to the parens patriae proceedings) or be transferred to the Court of Protection.

The Court considered the MCA 2005 (Transfer of Proceedings) Order 2007 SI 2007/1899 "Transfers from the Court of Protection to a court having jurisdiction under the children act" as well as it's mirror provision under Article 3 "Transfers from a court having jurisdiction under the Children Act to the Court of Protection". The factors for consideration under Article 3 were considered by Hedley J in **B (A Local Authority) v RM, MM and AM [2010] EWHC 3802 (Fam)**, para 28, which the President endorsed in his judgement.

"That raises the question particularly under Art 3(3)(d) as to what matters the court should take into account in deciding whether to exercise these powers and to adopt this approach. An ex tempore judgment in a case on its own facts is no basis for attempting an exhaustive analysis of these issues; nevertheless, a number of matters suggest themselves, matters which may often be relevant in the relatively small number of cases in which this issue is likely to arise. One, is the child over 16? Otherwise of course, there is no power. Two, does the child manifestly lack capacity in respect of the principal decisions which are to be made in the Children Act proceedings? Three, are the disabilities which give rise to lack of capacity lifelong or at least long-term? Four, can the decisions which arise in respect of the child's welfare all be taken and all issues resolved during the child's minority? Five, does the Court of Protection have powers or procedures more appropriate to the resolution of outstanding issues than are available under the Children Act? Six, can the child's welfare needs be fully met by the exercise of Court of Protection powers? These provisional thoughts are intended to put some flesh on to the provisions of Art 3(3); no doubt, other issues will arise in other cases. The essential thrust, however, is whether looking at the individual needs of the specific young person, it can be said that their welfare will be better safeguarded within the Court of Protection than it would be under the Children Act."

Munby P noted that the case of which Hedley J was concerned related to an application for a care order, as opposed to the present circumstances where care orders had already been made. He agreed with Hedley J's summary of the principles to apply and summarised his own reasons:

> *i) There can be no sensible basis for discharging any of the care orders which are already in place. The children require the continuing protection of such aspects of the care regime as LAC reviews and the support of an IRO.*
>
> *ii) While the care orders remain in place, the Family Court has a continuing, if much reduced, potential role in the lives of the children – for instance, if issues in relation to contact require to be determined in accordance with section 34 of the 1989 Act.*
>
> *iii) For the time being, at least until they are approaching their eighteenth birthdays, the children are the responsibility of the local authority's Children's Social Care (LAC) Teams, who are, in the nature of things, much more familiar with practice and procedure in the Family Court and the Family Division than with practice and procedure in the Court of Protection.*
>
> *iv) The children's guardians will be able to continue exercising that role so long as the cases remain within the Family Court and the Family Division; it is, at the least, doubtful whether they would be able to act as litigation friends in the Court of Protection.*
>
> *v) It may be easier to ensure judicial continuity if there is no transfer.*
>
> *vi) Put shortly, the benefits weigh heavily in favour of maintaining the forensic status quo. There are, in contrast, so far as I can see, no reasons for thinking that, to adopt Hedley J's words, the children's welfare will be better safeguarded within the Court of Protection.*

The Judgment annexes three forms of order to assist practitioners in such circumstances. i. Directions on Issue ii. Order following first hearing and iii order following final hearing, in addition a template social work statement is set out. Whilst the basic purpose in the templates will assist in ensuring conformity in the drafting of the orders/statements, the pro-formas hold the dual purpose of acting as a checklist of factors that require social worker analysis and the issues that the Court must rule on, for example the social work template highlights the necessity for analysis of the confinement, proposed care plan, Gillick competence, duration of order sought and details of consultation with the child and relevant persons. Munby P does note that whilst the orders are compatible with the compendium of standard family orders it will be for Sir Andrew McFarlane to add them to the Compendium in his capacity as President of the family division. Nonetheless, the orders represent a useful tool for practitioners facing cases that straddle the bounds of the two jurisdictions.

Charlotte Wilce

Relinquished babies: are Local Authorities obliged to inform family members before pursuing adoption? Case Study of *Re A (Relinquished baby Risk of domestic abuse)* [2018] EWHC 1981 (Fam)

In a recent decision of the High Court, Mr Justice Cobb made a declaration under the inherent jurisdiction that a Local Authority's application to arrange an adoption of a child without informing, or assessing, the putative father or extended family members was permissible and lawful.

Such an significant interference with not only the child but the putative father and extended family member's Article 8 rights may, at first blush, seem surprising. However, in reaching his decision Mr Justice Cobb considered the recent growing body of case law and carefully analysed the competing arguments. Significant to the decision was the evidenced risk of harm posed by the putative father to the child ('A'), his mother and siblings should A's existence be revealed.

The Facts

A's mother was in a very brief relationship with his father from whom she separated following his abusive behaviour. The father was not aware of the mother's pregnancy and although he entered into another relationship, he continued to harass the mother through various means.

The mother relinquished A at birth, agreeing for A to be accommodated by the Local Authority persuant to section 20 of the Children Act 1989. Initially, the mother gave an explanation that she lacked the practical resources to care for A. However, it became clear that the mother's greater concern was the risk posed by the father should he discover A's birth.

The father had a significant and longstanding history of perpetrating violence towards former partners and of antisocial and aggressive behaviour, including being threatening and abusive to court staff and the judiciary, showing contempt for court orders and having been assessed as unwilling or unable to work with child protection agencies. He was known to seven different police forces nationwide in relation to his abusive behaviour and had been assessed as posing a 'high risk' to the mother and her children.

A's mother had two other children in her care, one of whom had been adversely affected by the experience of domestic abuse perpetrated by a former partner of the mother. A had paternal half-siblings who the courts had decided should have 'no contact' with their father. A also had extended family members on both his maternal and paternal side.

The mother maintained that she wished for A to be adopted and that neither the father nor any maternal or paternal family members should be advised of A's existence.

The Application

The Local Authority sought a declaration from the High Court under the inherent jurisdiction to make arrangements for the adoption of A without notifying the putative father, paternal or maternal extended family members, or assessing them as carers for A.

The application was brought under Part 19 FPR 2010 as had been identified by Cobb J in *Re RA (Baby relinquished for adoption)* [2016] EWFC 25, [2017] 1 FLR 1610 at [50].

The Law

His Lordship considered the applicable law at paragraph [19] of his judgement which he concisely summarised as follows:

"*The law in this area is now well-rehearsed in a growing number of authorities, specifically Re JL & AO [2016] EWHC 440 (Fam), Re RA [2016] (see above), Re TJ [2017] EWFC 6, Re M & N (Twins: relinquished babies: Parentage) [2018] 1 FLR 293, and A Local Authority v the mother and another [2017] EWHC 1515 (Fam). I summarise the cardinal principles as they apply in this case as follows:*

i) Each case is fact-sensitive (Re RA at [31]);

ii) The outcome contended for here is "exceptional" (A Local Authority v the mother at [1]/[7])

iii) The paramount consideration is the welfare of A; section 1(2) Adoption and Children Act 2002 ('ACA 2002')

iv) The court must have regard to the welfare checklist in section 1(4) ACA 2002;

v) It is a further requirement of statute (section 1(4)(f)(iii) ACA 2002) that the court has regard to the wishes and feelings of the child's relatives;

vi) Respect can and indeed must be afforded to the mother's wish for a confidential and discreet arrangement for the adoption of her child, although the mother's wishes must be critically examined and not just accepted at face value; overall the mother's wishes carry "significant weight" albeit that they are not decisive (Re JL and AO at [47], [48] and [50], and see also Re RA at [43(vi)]);

vii) Article 8 rights are engaged in this decision; however, in a case where a natural parent wishes to relinquish a baby, the degree of interference with the Article 8 rights is likely to be less than where the parent/child relationship is to be severed against the will of the parent (Re TJ at [26]];

viii) Adoption of any kind still represents a significant interference with family life, and can only be ordered by the court if it is necessary and proportionate (Re RA at [32]);

ix) A high level of justification is still required before the court can sanction adoption as the outcome, and a thorough 'analysis' of the options is necessary (Re JL & AO at [32]); 'analysis' is different from 'assessment' – a sufficient 'analysis' may be performed even though the natural family are unaware of the process (Re RA at [34]). As I said in Re RA at [38]:

"in order to weigh up all of the relevant considerations in determining a relinquished baby case it may be possible (it may in some cases be necessary) and/or proportionate to perform the analysis without full assessment of third parties, or even their knowledge of the existence of the baby. The court will consider the available information in relation to the individual child and make a judgment about whether, and if so what, further information is needed".

The Decision

At paragraph [22] His Lordship identified "*the likely effect on A (throughout his life) of ceasing to be a member of the original family and becoming an adopted person (section 1(4)(c) ACA 2002), and the denial of A's family of the chance to claim him*" being "*weighty among the statutory factors*". He analysed what was likely to be forfeited by A of ceasing to be member of his original family, noting that the *reality* was that there was no realistic prospect of A being placed safely and securely in the care of any member of the maternal or paternal family (section 1(4)(f)(ii) ACA 2002).

At paragraph [24], he further considered that there was a threat to A's well-being and development were he to be placed within the family due to a very real risk of harm to A (section 1(4)(e) ACA 2002) from domestic abuse by the father.

Furthermore, he considered at [25] that should the father be made aware of A's existence, the likely disruption he would cause to the mother and her children would "cut significantly across their Article 8 rights to respect for their private and family life"

These factors, individually and together, made a "powerful case" justifying the relief sought.

Conclusions

It is thus clear that there are circumstances in which Local Authorities are not obliged to even inform, let alone assess, alternative family members including biological fathers of the adoption of a relinquished child.

However, this case reiterates the precise procedures that must be followed by Local Authorities and confirms that each case is fact-sensitive. Such outcomes remain 'exceptional' and if applications are to be successful, must be well evidenced. It is of particular note that in this case, His Lordship refused to grant the relief sought at an initial hearing without further evidence from the Local Authority and a full welfare analysis from the Children's Guardian.

Local Authorities must therefore remain prepared to fully justify applications of this nature and provide sufficiently cogent evidence upon which the court is able to make such significant and important decisions.

Bryan Patterson -Whitaker

Case Law Update

***LKH v TQA AL Z (Interim maintenance and pound for pound costs funding)* [2018] EWHC 2436**

Those practising in the field of Financial Remedies will be well acquainted with cases where one party or the other fails to comply with orders of the court. Often, but not always, that party is the financially dominant partner. Enforcement can prove particularly difficult when that individual is also resident abroad.

Such was the case in *LKH v TQA AL Z* where H had allowed arrears of £230,000 to accrue to W. Such arrears arose through a combination of unpaid interim maintenance, outstanding costs orders and, crucially, a £120,000 costs allowance for W's legal expenses. Holman J expressed his dissatisfaction with the *'grave history of non-compliance'*.

H asserted that he was simply unable to make the required payments and blamed his current illiquidity on the well-publicised collapse of Carillion Plc. That argument may have found some

sympathy with the court was it not for the fact that H had managed to pay £95,000 to his own legal team over the course of the preceding month.

With a view to persuading H to comply, W sought what is commonly known as a *Mubarak* order, albeit with a twist. A *Mubarak* order is made where a party's participation in future legal proceedings is made contingent on certain terms being complied with. In *Mubarak*, one of those terms was a 'pound for pound' costs order where H was obliged to pay £1 to W's solicitors for every £1 he spent on his own.

In the instant case, the Court was invited to debar H from participating in the financial remedy proceedings unless he paid £100 to W's solicitors for every £1 paid to his own! That application was not acceded to but Holman J still saw merit in the principle of a 'pound for pound' order and proceeded to injunct H of his own volition

'from paying any further money….to any firm of solicitors practising in England & Wales instructed by him (or any counsel instructed by him on a Direct Access basis) unless he pays an equal amount (i.e. pound for pound) to the wife's solicitors'.

In his concluding remarks, Holman J stated:

'it is frankly intolerable and an affront to justice that in the last month this man paid £95,000 to his new solicitors at the very time when he was already in arrears and getting further in arrears with his wife and her very patient and long suffering solicitors in the amounts I have described. The rationale behind the Mubarak decision must be to try and achieve an equal or level playing field and that is all I seek to do by this order…..I am quite satisfied that the order which I propose to make is well within the jurisdiction of the High Court and well within my discretion and that the facts and circumstances of this case now require and justify such an order'.

Of course, the beauty of the order made is that it does not rely exclusively on H's compliance. It would certainly be a foolhardy solicitor or barrister who received funds from H without ensuring that W's legal team had received the self-same sum. Enforcing compliance sometimes requires a degree of creative thinking. Do not hesitate to contact the writer to discuss potential options.